Supreme Court, U.S.
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No. 03-1546

IN THE

Supreme Court of the United States

ULYSSES I & COMPANY, INC.,

Petitioner,

v.

GARY FELDSTEIN and PETER MORTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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STATEMENT

This joint brief is submitted on behalf of respondents Gary Feldstein ("Feldstein") and Peter Morton ("Morton") in opposition to the petition of Ulysses I & Company, Inc. ("Ulysses") for a writ of certiorari to the United States Court of Appeals for the Second Circuit, (the "Petition"). Petitioner seeks to review that court's Order dated October 2, 2003 affirming with double costs the Judgment and Order of the United States District Court for the Southern District of New York dated August 15, 2002 pursuant to a Memorandum and Order of Judge Loretta A. Preska dated August 8, 2002. Judge Preska's order, *inter alia*, dismissed the action and permanently enjoined Ulysses and its principals with respect to future litigations over the same house on Long Island.

STATEMENT OF THE CASE

This is the second certiorari petition in this dispute. The first, (Case No. 01-107) like the Petition here, sought to review a dismissal of a federal action under the Rooker-Feldman doctrine (brought in the Eastern District of New York, which action will be detailed below). Both actions sought to overturn a fully affirmed judgment of Supreme Court of the State of New York, Suffolk County (the "Judgment") decreeing specific performance of a written contract to transfer title to the single family residence at 57 West End Road, East Hampton, New York (the "Premises") to Feldstein pursuant to his contract with one Jack Rounick ("Rounick"). After Feldstein received a sheriff's deed to the Premises as provided in the Suffolk County Judgment, he deeded the residence to Morton pursuant to a subsequent contract between them. This Court denied Ulysses' first certiorari petition, 554 U.S. 992 (2001).

This run of the mill real property case has, thanks to Ulysses' insatiable appetite for litigation, ballooned into nine separate actions, four of them initiated in federal courts, involving the time and attention of a total of thirteen different courts, seven of them federal. In all courts, trial and appellate, state and federal, Ulysses has lost unanimously, but it persists.

THE UNDERLYING DISPUTE

Despite Ulysses' blizzard of litigation, the facts giving rise to it are surprisingly simple. The Premises, a single family residence in East Hampton was originally owned by Rounick, now deceased.

On May 24, 1993, Rounick had contracted in writing to sell the Premises to Gary Feldstein for seven million dollars. Pursuant to that contract, Feldstein was given possession of the Premises while making a series of installment payments, culminating in the intended transfer of title to him in October 1998.

On August 13, 1998, shortly before Feldstein was to close on the Premises, Rounick was induced, by the promise of more money, to contract to sell to Ulysses the same Premises that he had already contracted to sell to Feldstein. Ulysses is an assetless corporate shell created to hide the identity of its actual principal, one Sheldon Solow ("Solow"), a billionaire real estate entrepreneur with a history of multiple litigations. Significantly, the Rounick-Ulysses contract was made expressly subject to Feldstein's contractual right to purchase the Premises. Nevertheless, after taking title, Ulysses sought to thwart Feldstein's contractual rights. The first Suffolk County Decision and the Judgment entered thereon recognized the illegality of this transaction, determined that

the conveyance to Ulysses constituted an anticipatory breach of Rounick's contract with Feldstein, and directed that clear title be transferred to Feldstein.

Feldstein had commenced that state court action seeking specific performance of his contract with Rounick. Ulysses had counterclaimed, *inter alia*, for a declaratory judgment that *it* owned the Premises and sought an order giving it possession. When Ulysses moved for summary judgment, Feldstein cross-moved. Based on a substantial record, Supreme Court, Suffolk County, per Justice Gerard D'Emilio, issued its decision dated January 31, 2000, awarding Feldstein specific performance (Petition App. N). Judgment was entered accordingly on February 8, 2000, (Petition App. M) and was thereafter fully affirmed by the Appellate Division, Second Department of the New York Supreme Court and leave to appeal to the Court of Appeals was denied.

After Ulysses had tried fruitlessly through the New York appellate courts to vacate the Suffolk County Judgment, and after the Suffolk County Supreme Court denied Ulysses' three subsequent motions to reopen the underlying litigation (all affirmed by Appellate Division), Feldstein finally received a sheriff's deed to the Premises as provided in the Judgment. He, in turn, deeded it to the Morton Lifetime Trust pursuant to his contract with Morton.

Besides its efforts in the original Suffolk County action, Ulysses instituted a number of other actions, summarized as follows,

	COURT	PLAINTIFF	DEFENDANT	RESOLUTION
1.	Supreme Court, Suffolk County	Feldstein	Ulysses (counterclaimant)	Fully affirmed summary judgment for Feldstein. Three motions to renew denied and all such denials affirmed by New York's Appellate Division, Second Department
2.	Village Court, East Hampton	Ulysses	Feldstein	Voluntarily withdrawn
3.	USDC, Eastern District of New York	Ulysses	Morton	Action dismissed
4.	USDC, Eastern District of New York	Ulysses	Feldstein, Morton, Gibbs, various local governments	Action dismissed by District Court, affirmed by Second Circuit, Certiorari denied.

	COURT	PLAINTIFF	DEFENDANT	RESOLUTION
5.	Supreme Court, New York County	Ulysses	Decten Fund	Action dismissed
6.	Bankruptcy Court, Southern District of Florida	Ulysses & Bridgewater	Feldstein	TRO denied, settlement between Feldstein and Bankruptcy Trustee approved, affirmed by District Court and Eleventh Circuit
7.	USDC, Southern District of New York (action sought to be reviewed)	Ulysses & Bridgewater (Bridgewater dropped in second amended complaint)	Feldstein, Morton, Gibbs and Others (Morton, Gibbs and others dropped in second amended complaint)	Action dismissed, Ulysses enjoined Affirmed by Second Circuit and sanctions imposed. Motion for Rehearing en banc denied.

	COURT	PLAINTIFF	DEFENDANT	RESOLUTION
8.	Supreme Court, Suffolk County (Subject to appeal)	Ulysses	Feldstein and Morton	Motion to Dismiss granted
9.	Supreme Court, New York County	Ulysses	First American Title and Congressional Abstract	Action dismissed. Affirmed, Appellate Division, First Department

In Ulysses' characteristic style, the Statement of Facts in its Petition, like its Complaint dismissed by Judge Preska, contain misstatements and half truths, sharply at variance with the affirmed factual findings and legal conclusions of the New York State courts. The Petition is also interlarded with aspersions directed at the New York judges. Thus at p. 7, it states that a state court decision was "contrary to law and fact"; at p. 8, it states Justice Jones "inexplicably reversed himself" and on p. 9 it states the sheriff's deed to Feldstein " illegally purported to transfer title", arguments already rejected by the New York appellate courts. These misstatements are so pervasive, it would be fruitless to try to correct all of them. In any event, the issues Ulysses purported to raise in the Southern District action are issues not of federal law but rather of New York law and the factual findings made by the New York courts. The findings of fact and conclusions of law of the New York courts are now final and binding.

Of particular relevance is Ulysses' second Eastern District Action. It was brought under the Civil Rights Act, 42 U.S.C. § 1983 against Feldstein, Morton, Morton's sister, Mara Gibbs and a variety of state and local governments. On August 1, 2002, Judge Denis R. Hurley dismissed the action against Feldstein and Morton based on the Rooker-Feldman doctrine, *res judicata* and collaterial estoppel and as against the governmental defendants for failure to allege a valid Civil Rights Act claim (Petition App. K).

That dismissal was affirmed by the Second Circuit in a summary order (Petition App. E) and this Court denied Certiorari. After Judge Hurley dismissed the second Eastern District Action and the New York Courts affirmed the Suffolk County judgment, Ulysses and its affiliate Bridgewater Operating Corporation instituted the Southern District action,

which is the subject of the Petition, under the Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* ("RICO"). This action was originally brought against Feldstein, Morton, their lawyers and others based on contentions previously made unsuccessfully in Ulysses' Eastern District Civil Rights action, its state court appeals and its serial motions to vacate the state court Judgment. Eventually after two amendments to the Complaint, Feldstein became the only defendant. That action was dismissed by Judge Preska based on *Rooker-Feldman* and *res judicata.* She also enjoined Ulysses and its principals from further litigation over the Premises in the federal courts without court approval while requiring a copy of the decision and judgment be appended to any future state court action brought by Ulysses (Petition App. D) The Second Circuit affirmed, imposing double costs "in light of Ulysses' extreme history of persistent, repetitive and vexation litigation involving the Premises and particularly in light of the frivolous nature of the instant appeal" (App. B p. B-7).

ARGUMENT

POINT I

THE INJUNCTION IS SUPPORTED BY THIS COURT AND EVERY GEOGRAPHIC CIRCUIT

The Petition seeks to concoct a dispute between the Second Circuit and other courts of appeal on the issuance of Judge Preska's injunction. Ulysses first tries to stitch together two different issues: (1) Can a district court issue an injunction involving future state court litigation; and (2) Can a district court issue an injunction against future litigations after it has held it lacks subject matter jurisdiction over the action giving rise to the injunction.

As to the first issue, Ulysses cites two cases where the courts of appeals vacated district court orders impinging on state court authority. Thus, *in Tropf v. Fidelity Title Insurance Co.*, 289 F.3d 929 (6th Cir. 2002) when the district court imposed a requirement that the enjoined plaintiff post a $50,000 bond before starting a new state action the Sixth Circuit reversed it as an "indirect" injunction against future state court actions. Similarly, *Christopher v. Stanley-Bostich, Inc.*, 240 F.3d 95 (1st Cir. 2001) struck down a provision in an order remanding a case back to state court for lack of subject matter jurisdiction which would limit plaintiff's damages in state court consistent with his argument giving rise to the remand that his damages were less than the federal jurisdictional amount. But the First Circuit was careful to point out that the state court was free to decide under its own law the estoppel effect of plaintiff's argument on his remand motion, but "it was not the province of the federal district court to dictate that result to the state court" (at p. 101).

Here the district court did not dictate to the state court. Rather, as both Judges Preska (App. D, pp. D-26 – 28) and the Second Circuit (App. B, p. B-6) pointed out, the injunction was in accordance with the much cited case of *In re Martin-Trigona*, 737 F.2d 1254 (2d Cir.), *on remand*, 592 F. Supp. 1566 (D. Conn. 1984), *affirmed*, 763 F.2d 140 (2d Cir. 1985). In its original decision there the Second Circuit, while vacating a "blanket extension" of its injunction to state courts as an "intrusion into state proceedings", went on to hold "a spirit of cooperative federalism calls upon us to alert state courts". That injunction leaves the state court free to decide for itself what it should do in light of such alert. The *Martin-Trigona* order drafted by the district court on remand and enthusiastically affirmed by the Second Circuit became the model for Judge Preska's injunction here (App. C).

The fact that the injunction in no way enjoined future state litigation can be seen by Ulysses' subsequent actions. Within a month of Judge Preska's judgment, it instituted a new action against Feldstein and Morton seeking title to the Premises in Supreme Court, Suffolk County. In its Complaint, Ulysses followed the letter of Judge Preska's injunction. That action was dismissed by Justice John J. J. Jones, Jr. in a decision dated June 13, 2003 (appended as Appendix A hereto) based both on *res judicata* and Ulysses' complaint's lack of merit. Like Judge Preska, Justice Jones found Ulysses "lacked a good faith basis for commencing this action and had no objective good faith expectation it could prevail." Accordingly, he also enjoined future actions by Ulysses. (Ulysses' appeal is now pending in the New York Appellate Division, Second Department).

Martin-Trigona, has received wide acceptance by federal courts throughout the country. This Court quoted it in *In Re McDonald*, 489 U.S. 180 n.8 at 185 (1989).

Of particular significance is the decision of the Ninth Circuit, the court Ulysses contends is in conflict with the Second Circuit, in *De Long v. Hennessey*, 912 F.2d 1144 (9th Cir. 1991) which criticized a district court for not following the procedure in *Martin-Trigona*, in issuing an injunction against future litigation.

The Ninth Circuit did disagree with the Second Circuit in *Western Systems, Inc. v. Ulloa*, 958 F.2d 864 (9th Cir. 1992) but for the reason that it adopted what the Ninth Circuit considered to be an overly restrictive rule on enjoining state court litigation.

Every other geographic circuit follows a liberal rule on enjoining future vexatious litigation: *See e.g.*

Castro v. United States, 775 F.2d 399 (1st Cir. 1985)

Matter of Packer Avenue Associates, 884 F.2d 745 (3d Cir. 1989)

In Re Burnley, 985 F.2d 1 (4th Cir. 1992)

Villas v. Crowley Maritime Corp., 990 F.2d 1489 (5th Cir. 1993)

Filipas v. Lemons, 835 F.2d 1145 (6th Cir. 1987)

In Re Chapman, 328 F.3d 903 (7th Cir. 2003)

Canady v. Allstate Insurance Co., 282 F.3d 1005 (8th Cir. 2002)

Tripari v. Beaman, 878 F.2d 35 (10th Cir. 1989)

Riccard v. Prudential Insurance Co., 307 F.3d 1277 (11th Cir. 2002)

In Re Green, 669 F.2d 779 (D.C. Cir. 1981)

Thus Ulysses' argument comes down to the Ninth Circuit decision in *Cook v. Peter Kiewit Sons Co.*, 775 F.2d 1030 (9th Cir. 1985). That case was decided before both of the two decisions of this Court on which the Second Circuit relied here, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Willy v. Coastal Corp.* 503 U.S. 131 (1992) and its own decisions in *De Long* and *Western Systems*. There is no indication that the Ninth Circuit would revert to *Cook* after this Court's clarification of the powers of a district court after it dismisses a case for lack of subject matter jurisdiction.

POINT II

ULYSSES' CONTENTION ABOUT A FRAUD EXCEPTION TO *ROOKER-FELDMAN* IS FRIVOLOUS

Ulysses' contention that this case raises an issue about a purported fraud exception to *Rooker-Feldman* is frivolous for three different reasons. In the first place, it is precluded from raising that issue by *res judicata*. Its earlier Civil Rights Act action making the same allegations was dismissed by the Eastern District under *Rooker-Feldman* (App. K); that dismissal was affirmed by the Second Circuit specifically because of *Rooker-Feldman* (App. E) and this Court denied certiorari. Thus Ulysses is precluded from contending *Rooker-Feldman* does not apply in this action by basic principles of *res judicata*.

Second, the principal cases relied upon by Ulysses, *Nesses v. Shepard*, 68 F.3d 1003 (7th Cir. 1995) and *Catz v. Chalker*, 142 F.3d 279 (6th Cir. 1998) both involve allegations of judicial impropriety. The other cases cited by Ulysses; *Sun Valley Foods Co. v. Detroit Marine Terminals, Inc.*, 801 F.2d 186 (6th Cir. 1986) and *Resolute Insurance Co. v. State of North Carolina*, 397 F.2d 586 (4th Cir. 1968) contained general dictum while holding there was no factual basis whatsoever for plaintiff's allegations (the Seventh Circuit also so held in *Nesses* which concerned the proper basis for dismissing the complaint there, *Rooker-Feldman* or *res judicata*).

But at best, Ulysses here is alleging impropriety by "court employees" not "judicial officers", as it admitted at p. 34 of its brief in the Second Circuit. Consequently, Ulysses is

bound by the numerous rejections of its contentions by the undisputedly uncorrupted "judicial officers" of the New York Court system in its appeal from the Suffolk County judgment, its three unsuccessful motions to vacate that judgment and the appellate affirmance of the denials of such motions. Ulysses' purported authorities are simply not in point here.

Finally, Ulysses' allegations, summarized by it at pp. 24-26 of its Petition, do not allege criminal activities of any sort, let alone a RICO violation. Rather, they raise issues of New York civil practice already decided against it by the New York courts in its original state court appeal and its serial motions to vacate the Suffolk County Judgment. Ulysses' arguments are interspersed with half truths such as saying at p. 26 that the purported findings of misconduct in a May 14, 2001 decision of Justice Jones (Petition App. L) was not disturbed by him, deliberately ignoring that on October 2, 2001 Justice Jones entered an order which expressly vacated those findings "in their entirety" and indicated that the sheriff could proceed to execute a deed to the Premises (annexed hereto as Exhibit B). The Second Department upheld this order in a decision dated June 10, 2002 specifically holding that Ulysses "failed to establish that the judgment was procured by fraud, misrepresentation or other misconduct" (annexed hereto as Exhibit C). Ulysses also engages in irrelevancies such as saying at p. 26 that the state court file was subpoenaed by the FBI in June *2000*, as if a subpoena which, four years later, has resulted in absolutely no further legal action is proof of anything other than there was no basis for any legal action.

Such multi-flawed meritless arguments by Ulysses have been characterized by United States District Judge Preska, New York Supreme Court Justice Jones and the Second Circuit as lacking in good faith. Here, such arguments constitute an abuse of the certiorari process.

CONCLUSION

For all the reasons stated herein, it is prayed that the Petition be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT, STATE OF NEW YORK, I.A.S. PART 10 SUFFOLK COUNTY DATED JUNE 13, 2003

SHORT FORM ORDER

INDEX NO.: 0024758/2002
SUBMIT DATE: 6/4/2003
MTN. SEQ. #: 001; 002; 003; 004

SUPREME COURT – STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 11/6/2002

MOTION NO.: 001 - MOT D
002 - XMOT D
003 - XMD
004 - XMD

ULYSSES I & COMPANY, INC.,

Plaintiff,

-against-

GARY FELDSEIN and PETER MORTON (Individually and as trustee for the PETER MORTON LIFETIME TRUST,

Defendants.

Appendix A

SHELDON SOLOW and STUART SCHLESINGER,

Additional Defendants
on counterclaim

Upon the following papers numbered 1 to *98* read on this motion and cross-motion for summary judgment, cross-motion to vacate restraining order and cross-motion for partial summary judgment; Notice of Motion/Order to Show Cause and supporting papers *1-63*; Notice of Cross Motion and supporting papers *64-74; 82-84; 85-91*; Answering Affidavits and supporting papers *75-76; 77-81; 92-94*; Reply Affidavits and supporting papers *95-96; 97-98*; Other _____; it is

ORDERED that this motion by defendant, Peter Morton, individually and as trustee for the Peter Morton Lifetime Trust (Morton), and cross-motion by the co-defendant, Gary Feldstein, to the extent they seek an order severing the counterclaims and dismissing the amended complaint of plaintiff, Ulysses I & Company, Inc. (Ulysses), is granted; and it is further

ORDERED that upon payment of the proper fees, if any, the County Clerk of the County of Suffolk be and is hereby directed to cancel and discharge of record a certain notice of pendency filed in this action against the property at District 0301, Section 01500, Block 05.00, Lot 008.000, known as 57 West End Road, Town of East Hampton, County of Suffolk, State of New York, and the said County Clerk is hereby directed to enter upon the margin of the record of same a notice of cancellation referring to this Order; and it is further

Appendix A

ORDERED that the application by defendant Morton for an order of attachment is denied and the temporary restraining order imposed by order to show cause dated October 22, 2002 and extended by order of this Court dated February 5, 2003 is vacated; and it is further

ORDERED that the separate motion by plaintiff, deemed herein to be a cross-motion, to the extent it seeks partial summary judgment on its claims for declaratory and injunctive relief is denied as moot for reasons set forth herein; and it is further

ORDERED that the cross-motion by defendant Morton for an order granting partial summary judgment on the counterclaims is denied; and it is further

ORDERED that Ulysses, its agents, employees, shareholders, directors and officers are hereby enjoined from commencing any action or proceeding in the Courts of the State of New York that is in any way, directly or indirectly, connected with or related to the premises located at 57 West End Road, Town of East Hampton, County of Suffolk, State of New York, unless a complete, legible copy of this Order and the Judgment to be entered thereon has been affixed to each document filed in connection with such action or proceeding; and it is further

ORDERED that in all other respects the motion and cross-motions are denied.

Appendix A

Plaintiff commenced this action for a declaratory judgment declaring null and void a certain sheriff's deed dated October 3, 2001 and a deed from Feldstein to Peter Morton Lifetime Trust for the premises at 57 West End Road, East Hampton, New York, for an order directing the defendants to surrender title and possession of the premises to plaintiff, and awarding damages for alleged alteration of documents filed with the Suffolk County Clerk. Defendant has asserted a counterclaim for tortious interference with contract, malicious prosecution, *prima facie* tort and abuse of process. Defendant Morton now moves and co-defendant Feldstein cross-moves for an order granting summary judgment in their favor dismissing the complaint against them, vacating the notice of pendency filed by the plaintiff, enjoining the plaintiff from filing or joining in actions relating to the subject premises without prior leave of Court and awarding sanctions. Plaintiff has opposed the application and has cross-moved for partial summary judgment in its favor. Likewise, defendant Morton has cross-moved for an order granting summary judgment on his counterclaims against Ulysses and defendants Sheldon Solow and Stuart Schlesinger and for an order vacating the mortgage from Ulysses to Solow filed with the County Clerk on August 29, 2000.

The history of this action has been set forth at length in the order of the Court dated January 31, 2000 (D'Emilio, J.) and judgment entered February 7, 2000 which granted specific performance of a contract to transfer title, free and clear of all encumbrances, to the certain premises located at 57 West End Road, East Hampton, New York to Feldstein. Such judgment was affirmed by Decision and Order of the

Appendix A

Appellate Division, Second Department, dated October 10, 2000. An appeal to the Court of Appeals was dismissed on December 21, 2000 with $500 costs against Ulysses and successive motions by Ulysses for leave to appeal were denied. Subsequent motions by Ulysses for leave to renew the determination which, in effect, disallowed Ulysses' claim to title to the premises and awarded title to Feldstein, were denied by this Court in orders dated May 14, 2001, and October 2, 2001, and January 25, 2002, all of which were affirmed by the Appellate Division, Second Department. Leave to reargue or appeal to the Court of Appeals those three orders was denied by order dated January 17, 2003.

An action commenced by Ulysses in United States District Court of the Eastern District of New York which raised many of the same arguments asserted in the Suffolk County action was dismissed from the bench by the Hon. Denis R. Hurley for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine (see *Rooker v. Fidelity Trust Co.*, 263 US 413 [1923]; *see also District of Columbia Court of Appeals v. Feldman*, 460 US 462 [1983]). On April 18, 2001, the Second Circuit Court of Appeals affirmed the trial court determination and a subsequent petition for a writ of certiorari was denied. By sheriff's deed dated October 3, 2001 which was filed on October 10, 2001, title to the premises was transferred to Feldstein. A second action was commenced by Ulysses in the United States District Court for the Southern District of New York in November 2001, after the filing of the sheriff's deed, containing various allegations against Feldstein relating to the subject property. It, too, was dismissed by memorandum and order dated August 8, 2002 (Preska, J.) under the *Rooker-Feldman* doctrine and on the ground that the claims were *res judicata*.

Appendix A

Notwithstanding the foregoing history of litigation, plaintiff commenced this action for declaratory judgment and filed yet another notice of pendency against the subject property. The ultimate relief sought by plaintiff in this action, a declaration that neither Morton nor his predecessor, Feldstein, obtained title to the subject property, is sufficiently related to the relief sought in the prior state and federal actions, however, so as to bar such relief under the doctrine of *res judicata*. As a general rule, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Parker v. Blauvelt Vol. Fire Co., Inc.*, 93 NY2d 343, 712 NE2d 647, 650, 690 NYS2d 478 [1999], quoting *O'Brien v. City of Syracuse*, 54 NY2d 353, 357). Thus, the Courts of this state have held that where a plaintiff in a later action brings a claim and could have been asserted in a previous action against the same party, based on the same harm and arising out of the same or related facts, the claim is barred by *res judicata* (*see Parker v. Blauvelt Vol. Fire Co., Inc.*, *supra* at 93 NY2d 349, citing *Pauk v. Board of Trustees*, 111 AD2d 17, 20, *affd* 68 NY2d 702). Moreover, as the previous actions all determined that Ulysses had no right to title and that title rightfully belonged to Feldstein, Ulysses has no standing to challenge the validity of the deeds which have been filed in the office of the County Clerk. Accordingly, defendants' motion and cross-motion, to the extent they seek an order severing the counterclaims and dismissing the complaint against them, are granted and the notice of pendency filed against the subject property is vacated.

Appendix A

To the extent that defendant Morton seeks an order attaching funds presently held in escrow by Stroock, Stroock & Lavan, LLP, such application is denied. While it has been held that a foreign corporation which filed a post-attachment, pre-confirmation application to do business can not, by that act alone, cause an order of attachment to be vacated (*see Elton Leather Corp. v. First General Resources Co.*, 138 AD2d 132, 137, 529 NYS2d 769 [1st Dept 1988]), no order of attachment was obtained prior to the receipt by plaintiff Ulysses of authority to do business in New York. Since defendant has otherwise failed to demonstrate that the requirements for attachment under CPLR 6201 have been satisfied, the temporary restraining order must be vacated and the request for attachment denied (*see Benedict v. Browne*, 289 AD2d 433, 735 NYS2d 404 [2d Dept 2001]).

Defendant Morton's application for an order granting summary judgment on his counterclaims and vacating the mortgage from Ulysses to Solow is denied, without prejudice to renew upon a proper evidentiary showing. The courts have repeatedly held that in order to obtain summary judgment, movant must establish its claims or defenses sufficiently to warrant a court's directing judgment in its favor as a matter of law (*see Gilbert Frank Corp. v. Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988], citing *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [1980]; *Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790, 390 NE2d 298 [1979]). Defendant has failed to demonstrate his *prima facie* entitlement to judgment in his favor, as the purported verification of his answer with counterclaims erroneously indicates that he is the plaintiff and that the allegations

contained in the "Verified Complaint" are true and correct. Since the affidavit of defendant dated October 2, 2003 is insufficient in itself to establish each element of the claims asserted against the plaintiff and additional defendants on the counterclaims, summary judgment in favor of defendant Morton must be denied (*see Puritan Ins. Co. v. Continental Cas. Co.*, 195 AD2d 291, 599 NYS2d 602 [1st Dept 1993], citing *Zuckerman v. City of New York, supra* at 49 NY2d 563).

As observed by Judge Preska in the aforementioned second federal action commenced by plaintiff, Ulysses has a history of duplicative litigation with respect to its claims against the subject property. Since its claims have been repeatedly and consistently rejected by the courts of this state and federal courts, it lacked a good faith basis for commencing this action and had no objective good faith expectation that it could prevail. Plaintiff has repeatedly imposed unnecessary burden and expense upon the courts as well as the defendants and, as it appeared that plaintiff will cease to engage in vexatious litigation absent an order enjoining it from doing so, the defendants' application for an order enjoining the plaintiff from commencing additional actions or proceedings in the Courts of this State in connection with the subject property is granted to the extent indicated herein.

Settle judgment on notice.

DATED: *13 June 03*

s/ John J.J. Jones, Jr.
HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: _ FINAL DISPOSITION
X NON-FINAL DISPOSITION

APPENDIX B — ORDER OF THE SUPREME COURT, STATE OF NEW YORK, I.A.S. PART 10 SUFFOLK COUNTY DATED OCTOBER 2, 2001

SHORT FORM ORDER

INDEX NO.: 0020970/1998
SUBMIT DATE: 7/11/2001
MTN. SEQ. #: 015; 016

SUPREME COURT – STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 7/3/2001

MOTION NO.: 015 - MD
016 - XMOT D; CASEDISP

GARY FELDSTEIN,

Plaintiff,

-against-

JACK ROUNICK and ULYSSES I & COMPANY, INC.,

Defendants.

Upon the following papers numbered 1 to *45* read on this motion and cross-motion for leave to reargue; Notice of Motion/Order to Show Cause and supporting papers *1-21*;

Appendix B

Notice of Cross Motion and supporting papers *22-39*; Answering Affidavits and supporting papers *40-41; 42-43*; Replying Affidavits and supporting papers *44; 45*; Other ____; it is,

ORDERED that this motion by defendant, Ulysses I & Company, Inc., for an order granting leave to renew and/or reargue its prior motion which was determined by the order of this Court dated May 14, 2001 is denied; and it is further

ORDERED that the cross-motion by plaintiff, Gary Feldstein, to the extent it seeks an order granting leave to reargue the aforesaid motion by defendant and its cross-motion is granted and, upon such reargument, the second and third decretal paragraphs in the Order of this Court dated May 14, 2001 are hereby vacated in their entirety and the aforementioned judgment of the Hon. Gerard D'Emillio remains in full force and effect (see *Feldstein v. Rounick*, 276 AD2d 523, 714 NYS2d 689 [2d Dept 2000] appeal denied, 96 NY2d 707, 749 NE2d 207, 725 NYS2d 638 [2001]; and it is further

ORDERED that to the extent the cross-motion by plaintiff seeks an order directing the Sheriff of Suffolk County to execute a deed to the premises located at 57 West End Road, East Hampton, New York, such application is denied, since the aforementioned judgment of the Court is self effectuating upon defendants' failure or refusal to execute a deed and transfer title by March 10, 2000.

DATED: *2 Oct. 01*

s/ John J.J. Jones, Jr.
HON. JOHN J.J. JONES, JR.
J.S.C.

APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED JUNE 10, 2002

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION :
SECOND JUDICIAL DEPARTMENT

__ AD2D __ Argued – May 7, 2002

NANCY E. SMITH, J.P.
CORNELIUS J. O'BRIEN
HOWARD MILLER
BARRY A. COZIER, JJ.

2001-05541
2001-08854

Gary Feldstein, respondent, v Jack Rounick, defendant, Ulysses I & Company, Inc., appellant.

(Index No. 20970/98)

DECISION & ORDER

Mintz & Gold LLP, New York, N.Y. (Vito J. Titone of counsel), Dreier & Baritz LLP, New York, N.Y. (Marc S. Dreier of counsel), and David Boies, Armonk, N.Y., for appellant (one brief filed).

Stroock & Stroock & Lavan LLP, New York, N.Y. (Kevin L. Smith and Heidi Balk of counsel), for respondent.

Appendix C

In an action, inter alia, for specific performance of a contract for the sale of real property, the defendant Ulysses I & Company, Inc., appeals from so much of (1) an order of the Supreme Court, Suffolk County (Jones, J.), dated May 14, 2001, as denied its motion for leave to renew the plaintiff's cross motion for summary judgment, and (2) an order of the same court, dated October 2, 2001, as denied its motion for leave to renew and/or reargue the order dated May 14, 2001, and granted the plaintiff's cross motion for reargument, and, upon reargument, inter alia, reinstated a judgment of the same court dated February 7, 2000, which directed specific performance of the contract.

ORDERED that the appeal from the order dated May 14, 2001, is dismissed, as that order was superseded by the order dated October 2, 2001, made upon reargument; and it is further

ORDERED that the appeal from so much of the order dated October 2, 2001, as denied that branch of the appellant's motion which was for leave to reargue is dismissed, as no appeal lies from an order denying leave to reargue; and it is further,

ORDERED that the order dated October 2, 2001, is affirmed insofar as reviewed; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

The Supreme Court initially granted summary judgment to the plaintiff and issued a judgment dated February 7, 2000,

which, inter alia, directed specific performance of a contract for the sale of real property. The judgment was affirmed on appeal (*see Feldstein v. Rounick*, 276 AD2d 523). The appellant subsequently moved to vacate the judgment pursuant to CPLR 5015(1)(2) and (3) and for leave to renew the plaintiff's motion for summary judgment. The Supreme Court, in the order dated May 14, 2001, vacated the judgment pursuant to CPLR 5015(a)(3) and directed the plaintiff to submit a new judgment. However, the court adhered to its determination that the plaintiff was entitled to specific performance of the contract.

The appellant moved for leave to renew and/or reargue the order dated May 14, 2001, and the plaintiff cross-moved for leave to reargue. By order dated October 2, 2001, the Supreme Court denied the appellant's motion, granted the plaintiff's cross motion, and, upon granting reargument to the plaintiff, reinstated the judgment dated February 7, 2000. We affirm.

The Supreme Court properly denied that branch of the appellant's motion which was to vacate the judgment pursuant to CPLR 5015(a)(3), as the appellant failed to establish that the judgment was procured by fraud, misrepresentation, or other misconduct. The Supreme Court also properly denied that branch of the appellant's motion which was based on CPLR 5015(a)(2), as the appellant failed to show that the alleged newly-discovered evidence could not have been discovered with due diligence before entry of the judgment (*see Orix Credit Alliance v. Grace Indus.*, 274 AD2d 424; *Dan's Supreme Supermarkets v. Redmont Realty Co.*, 261 AD2d 353).

Appendix C

The appellant's remaining contentions are without merit.

SMITH, J.P., O'BRIEN, H. MILLER and COZIER, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

June 10, 2002